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IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, ET AL.,

Petitioners.

—v.—

JENNIFER K. HARBURY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE URGING AFFIRMANCE

ROBERT RUBIN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
301 Mission Street, Suite 400
San Francisco, California 94105
(415) 543-9444

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

ROBERT E. BORTON
SCOTT D. WIENER
Counsel of Record
HELLER EHRMAN WHITE & MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104-2878
(415) 772-6000

Attorneys for Amici Curiae Lawyers' Committee For Civil Rights of the San Francisco Bay Area and American Civil Liberties Union

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants, refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the Washington, D.C.-based Lawyers' Committee for Civil Rights Under Law, which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco.

Throughout its history, the Lawyers' Committee has dedicated itself to ensuring access to the judicial system, particularly for the most vulnerable individuals and groups in our society. Unreasonable obstacles to ensuring unfettered access to legal redress must be closely scrutinized. The Lawyers' Committee is particularly concerned about any legal precedent that might chill the ability of private citizens to seek legal remedies against government officials who engage in official misconduct.

Amicus curiae American Civil Liberties Union ("ACLU") is a national non-partisan organization of almost 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, amici curiae submit this brief urging affirmance of the judgment of the court of appeals. The parties have consented to the filing of this brief, and their written consents are being filed with the Clerk of the Court simultaneously with this brief.

No counsel for a party authored this brief in whole or in part. No person, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons. The issues presented in this case, relating to the ability of citizens and others to seek redress against public officials who engage in serious misconduct, are of significant interest to the ACLU and its members.

I. INTRODUCTION

In deciding this case, it is important to keep in mind the exceptional factual allegations that gave rise to Respondent's claim: deliberate and persistent lies by public officials that induced (and that were designed to induce) Respondent not to seek information pursuant to the Freedom of Information Act ("FOIA") and not to bring suit to save her husband's life. In light of the egregious nature of Petitioners' alleged misconduct, Respondent has stated a viable claim for relief, and Petitioners are not entitled to qualified immunity. Respondent alleges that government officials engaged in a prolonged and deliberate pattern of misrepresentations for the very specific purpose of preventing her from obtaining truthful information and filing a lawsuit against the responsible government officials. In other words, Petitioners are alleged to have engaged in a pattern of misrepresentations against Respondent not simply to further their view of government policy but also to induce Respondent not to discover the truth and to file a lawsuit based on the truth.

This lawsuit is not, as Petitioners contend, about the ability of government officials to refuse to disclose sensitive information about the government's foreign policy. Nor is it about the ability of a citizen to intimidate government officials, by threat of suit, into betraying their public trust by revealing such information. That is not what Respondent is claiming, Petitioners' repeated mischaracterizations of her claim notwithstanding.

Rather, Respondent's claim is quite narrow and focused and concerns only the extraordinary and egregious alleged misconduct at issue here. Respondent simply alleges that had these Petitioners not lied to her and misled her, she would have

pursued a FOIA request immediately, would have learned the truth from that FOIA request, and would have brought a lawsuit to save her husband's life, among other things. Respondent alleges that by lying to her for the specific purpose of inducing her not to seek the truth and for the specific purpose of preventing a lawsuit based on the truth, Petitioners succeeded in preventing Respondent from seeking redress from the courts until it was too late to save her husband's life.

That claim comfortably fits into the well-established doctrine of the constitutional right of access to courts. Petitioners' rigid and overly narrow recitation of the doctrine's scope is inaccurate. The doctrine is functional in nature and not dependent upon the erection of physical or "institutional" barriers to filing a lawsuit, as Petitioners argue. The doctrine is implicated when government action — whether formal or informal and whether pursuant to an official policy or an unwritten practice — effectively prevents a person from filing suit and thereby harms that person. As we describe below, courts have applied the doctrine in a variety of contexts that belie the rigidity of Petitioners' analysis.

Nor should the Court accept the invitation of Petitioners and the United States to decide whether a remedy pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), should be implied here in light of FOIA and similar statutes. That issue was neither raised nor decided below, was not among the questions presented in the petition for certiorari, and, to our knowledge, has never been addressed by any court of appeals. Given the extreme nature of the argument — that FOIA and similar statutes providing for access to government documentary records somehow "remedy" intentional and affirmative misrepresentations by government officials that result in damages — the Court should not reach out to decide the issue without fuller litigation in the lower courts and proper presentation to this Court.

The Court should affirm the decision of the court of appeals, but whatever the Court's ultimate disposition of the case, it should limit that disposition to the discrete issues that are

before the Court and should refrain from reaching out for complex and far-reaching issues that have not been presented and that are not necessary to decide the viability of Respondent's claim.

II. SUMMARY OF ARGUMENT

For many years, this Court has held that citizens have a constitutional right to access a judicial forum to pursue claims. The Court repeatedly has invalidated statutes and other provisions that have impeded that protected access. Moreover, courts have held on many occasions that government officials may be liable in damages if they illegally prevent citizens from accessing the courts.

The various types of claims falling within the doctrine belie Petitioners' contention that the doctrine is narrowly confined to "institutional" barriers to filing a lawsuit and formal barriers to lawsuits by prisoners. The doctrine applies to government action — whether formal or informal and whether the result of an official policy or an unwritten practice — that prevents citizens from accessing a judicial forum.

The doctrine, therefore, is implicated not only in a narrow set of factual categories (prisoner cases, cases involving wrongful suppression of evidence, and the like), but in other settings as well. For example, courts have applied the doctrine in the bankruptcy/receivership setting, tax litigation, medical abuse cases, employment cases, divorce cases, products-liability actions, antitrust actions, environmental enforcement actions, contract actions, and other contexts.

The access-to-courts doctrine thus is functional in nature and applies to government action that improperly prevents filing of suit to pursue a claim for relief. The nature of the doctrine and its variable application lead to two conclusions. First, the court of appeals correctly held that Respondent's claim fits within the doctrine's framework. Second, because of the varied contexts in which the doctrine can arise, the Court need not and should not go beyond a determination of whether, as presented in the petition for certiorari, the type of claim that Respondent has

asserted is maintainable. No one — not Petitioners, not the United States — has questioned the continuing vitality of the doctrine or of *Bounds v. Smith*, 430 U.S. 817 (1977), and its progeny. Instead, Petitioners and the United States do no more than argue that the specific facts that Respondent has alleged do not give rise to a cause of action for violation of her right of access to courts under the standards announced in *Bounds* and its progeny. Given that no one is challenging the vitality of the access-to-courts cases beyond the specific type of claim that Respondent has asserted, the Court need not and should not go beyond an assessment of that claim.

Nor should the Court reach the issue of remedy that Petitioners raised for the very first time in their opening brief in this Court — whether, assuming the existence of a constitutional violation, the Court should imply a *Bivens* remedy. Petitioners' primary argument in this regard is that by enacting FOIA and similar statutes, Congress has established a comprehensive regulatory scheme governing requests by citizens for information from the government. Based on that premise, Petitioners conclude that the Court should not imply a constitutional damages remedy for the fact pattern alleged in this case — i.e., deliberate oral lies by federal officials designed to induce Respondent not to file suit.

Petitioners never raised that argument below, the court of appeals (understandably) did not address the issue, and Petitioners did not present it in their petition for certiorari. Moreover, we are unaware of any decision by any court of appeals (and neither Petitioners nor the United States has cited any such decision) that has addressed this issue. Thus, the Court should not reach this novel question and should let the lower courts address it in the first instance.

It is particularly appropriate to defer assessment of the *Bivens* issue given the extraordinary nature of Petitioners' argument. Petitioners, and the United States as well, assert that Congress's creation of a mechanism for citizens to obtain a limited universe of official documentary material effectively occupies the field with respect to the regulation of all

information flow between government and citizens. According to Petitioners, the availability of obtaining written documents under FOIA and similar statutes effects a bar against damages suits for direct oral misrepresentations by public officials.

Petitioners' argument distorts the careful limitations that the Court has placed on the *Bivens* doctrine and mischaracterizes both FOIA and the nature of Respondent's claim. The Court has limited application of the *Bivens* doctrine in three situations: (1) where a damages remedy would not deter misconduct by individual government officials; (2) where an adequate alternative remedy exists to satisfy the plaintiff's claim for compensation and remediation; and (3) where creation of a damages remedy would severely undermine an area of government policy that is both sensitive and delegated to the executive and/or le gislative branch.

None of those limitations denies a remedy to Respondent. Indeed, the only ways that Petitioners and the United States are able to support their argument that FOIA and similar statutes provide Respondent with any "remedy" (and, indeed, an "adequate remedy") are to mischaracterize Respondent's claim as alleging breach of a duty to disclose information and to mischaracterize FOIA and similar statutes as constituting the sole methods of communication between government and citizens. Given that Respondent's claim is based on alleged deliberate, repeated, and affirmative oral misrepresentations designed to prevent her from discovering the truth and to induce her not to file suit — and is not based on breach of a duty to disclose that arguably could have been cured by a FOIA request — and given that FOIA and similar statutes cover but one discrete area of government-citizen communications and say nothing about direct oral communications, Petitioners' argument misses the mark. Petitioners have identified nothing in FOIA or similar statutes that could have remedied Petitioners' alleged lies and the resulting harm to Respondent.

For the same reason, Petitioners' argument that a damages remedy would undermine foreign policy also fails. Again,

disclose sensitive information that would have undermined foreign policy. Instead, Respondent is alleging that Petitioners lied to her in order to prevent her from discovering the truth and to induce her not to file a lawsuit. Whether the government was under any obligation to disclose information to Respondent is a distinct issue from whether Petitioners were under an obligation not to lie to Respondent with the purpose of impeding her ability to sue. And, whether requiring the government to disclose information would undermine foreign policy says nothing about whether requiring government officials not to lie would undermine foreign policy.

Finally, Petitioners' argument that implication of a *Bivens* remedy here would have significant financial consequences for the United States Treasury is without basis. What Petitioners ignore in advancing that argument is that Respondent's access-to-courts claim names individual federal employees in their *personal* capacities and does not name either the United States or any agency of the United States. The United States may choose to indemnify its employees for liability that they incur, but it is factually inaccurate to state that Respondent's claim will automatically drain the U.S. Treasury. Her claim will do no such thing unless the United States chooses to let it do so.

Indeed, to view a *Bivens* claim, as Petitioners suggest, as directly and automatically implicating the U.S. Treasury would undermine the very purpose of *Bivens* — the creation of a deterrent to unconstitutional acts by individual public officials. If *Bivens* is nothing more than an indirect way to sue the United States (a basic premise of Petitioners' public -fisc argument and directly contrary to recent statements by this Court in *FDIC v. Meyer*, 510 U.S. 471 (1994)), then that deterrent effect would be significantly undermined.

Petitioners' public-fisc argument fails for other reasons as well. Respondent's claim is exceptional, to say the least. It is hardly the type of claim that would induce plaintiffs to inundate the courts with similar lawsuits. Compared with claims for which this Court has permitted *Bivens* claims — for example,

scenario of an allegedly illegal search by federal law enforcement officers — permitting people in Respondent's position to seek monetary damages would not have a significant fiscal impact on the government.

III. ARGUMENT

A. Despite Petitioners' Mischaracterization Of The Scope And Functionality Of The Access-To-Courts Doctrine, Respondent's Claim Fits Comfortably Within That Doctrine.

The access-to-courts doctrine is designed to prevent precisely the type of harm that Respondent alleges — government conduct that prevents people from discovering the truth and filing suit based on the truth to vindicate their legal rights. It does not matter whether the conduct reflects formal policy or informal practice or whether the barrier that the government erects physically bars access or does so in other ways. Nor does it matter what the specific subject of the claim is. Respondent's claim that Petitioners deliberately lied to her for the specific purposes of preventing her from discovering the truth and thereby inducing her not to pursue her legal claims falls squarely within the doctrine's framework.

Only by ignoring the functional basis of the access-to-courts doctrine and by rigidly focusing on specific types of barriers and specific subject-matter contexts are Petitioners able to argue that Respondent's claim falls outside the doctrine. Petitioners would have the Court believe that the doctrine applies only in two very narrow contexts: (1) "institutional mechanisms that directly preclude access to the courts"; and (2) "arbitrary restrictions on judicial access for prisoners held in government custody." Pet. Brief at 13. In other words, according to Petitioners, the doctrine only applies to formal policies that bar access to the courthouse and to prisoners who are prevented from filing their complaints.

Access to courts, however, is not nearly as ossified as Petitioners contend. Contrary to the formalistic categories that Petitioners have fashioned, the doctrine's development

evidences a much more functional application arising from the core principle that people should be permitted to access a judicial forum to vindicate significant legal rights and that denial of that access by government officials is improper. The long development of the access-to-courts doctrine thus has given rise to various types of claims in various different subject areas and based on various forms of government action.

One key premise underlying Petitioners' narrow definition of the right of access to courts is that the doctrine is primarily concerned with formal barriers to filing suit — "institutional" barriers. That premise allows Petitioners to discount the misconduct that allegedly occurred here, namely, informal and perhaps isolated acts by public officials designed to prevent Respondent from discovering the truth and from filing suit. Yet, even if Petitioners' conduct was informal and isolated, this Court's articulation of the doctrine is not so formalistic as to exclude such real barriers to accessing the courts.

The Court's decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), illustrates the point. In that case, the Court held that a required fee for filing for divorce was unconstitutional in that it prevented indigent persons from accessing the courts to terminate their marriages. The fee was not designed to bar access by indigents, but it effectively achieved that end by not providing a waiver based on need. The statute thus was unconstitutional.

The question then becomes whether the *Boddie* holding would have been the same if Connecticut, to remedy the constitutional defect, had provided court clerks with discretion to waive the fee for indigents but if, as an unwritten practice (perhaps because of a hostility to divorce), certain clerks generally (but not always) declined to exercise that discretion. Would the holding have been the same if the court clerk arbitrarily had exercised discretion in refusing to waive Gladys Boddie's filing fee under that unwritten practice?

The answer must be "yes," given that such a regime would just as effectively have barred Ms. Boddie's access to the

courts. From her perspective, it would not have mattered whether the denial of her access to the courts resulted from a rigid "barrier" erected by the legislature or from an informal and flexible practice that only sometimes prevented access. From her vantage point, the government still would have prevented her from accessing a judicial forum. Justice Harlan, writing for the *Boddie* Court, addressed the issue:

> Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Id. at 380. Thus, *Boddie* — consistent with the access-to-courts doctrine generally — was not concerned with the formality of the policy regarding fees. *Boddie* was concerned with the fact that Gladys Boddie, as an individual in the particular circumstances that she confronted, could not gain access to the courts because she could not afford the filing fee and because Connecticut (whether through formal policy or unwritten practice) insisted that she pay it.

Policy or no policy, law or no law, formality or no formality, government actions resulting in denial of access to the courts are unconstitutional. Petitioners' description of the doctrine, by diverting focus from the policy underlying the doctrine to two formalistic categories of claims comprising a subset of the doctrine, is inaccurate.

Like Petitioners' focus on formal and "institutional" barriers to the courts, their focus on a very narrow set of factual contexts in which the doctrine applies is also unsatisfying and inaccurate. Petitioners focus on a limited array of access-to-

courts cases, including cases in which prisoners are effectively prevented from filing lawsuits, *see, e.g., Bounds v. Smith*, 430 U.S. 817; cases in which indigent persons are prevented from accessing the courts, *see, e.g., Boddie*, 401 U.S. 371; *Griffin v. Illinois*, 351 U.S. 12 (1956); and cases in which law enforcement wrongfully suppresses evidence and thus delays or destroys the ability of a party to file suit, *see, e.g., Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997).

These cases, while important embodiments of the doctrine, do not exhaust the types of governmental actions that impermissibly interfere with access to the courts. The differing contexts in which courts have applied the doctrine refute the subject-matter limitations for which Petitioners advocate and underline that the doctrine is defined not by narrow fact patterns but rather by the fundamental principle that people should not be prevented from seeking relief from the judicial branch.

For example, courts have applied the doctrine where a time-consuming administrative prerequisite to filing suit could effectively prevent the plaintiff from obtaining personal jurisdiction over the defendant;[2] where a municipal defendant amended a regulation and thereby prevented public access to documents that could prove the municipality's liability;[3] where a tax statute required that before challenging a tax, the taxpayer prepay the tax and commence an administrative proceeding in

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[2] *See Jiron v. Mahlab*, 659 P.2d 311 (N.M. 1983).

[3] *Int'l Ass'n of Firefighters, Local 2069 v. City of Sylacauga*, 436 F. Supp. 482, 491 (N.D. Ala. 1977) ("[T]he timing and substance of the amendment suggest that its purpose is to quell lawsuits against defendants which could otherwise result from access to the . . . records.").

which constitutional claims could not be raised;[4] where a bankruptcy regulation required bankruptcy trustees to obtain approval from the United States Trustee before filing a final accounting for the bankruptcy estate;[5] where a trial court refused to allow a party to intervene in a receivership proceeding to sue the receiver and refused to allow an independent suit;[6] where a proposed consent decree in a CERCLA enforcement action would have imposed severe daily penalties for violation by the private party without adequate judicial review;[7] and where a stay would require a plaintiff to delay suing the President of the United States for conduct occurring before the President took office.[8]

These are only a few of the contexts in which the access-to-courts doctrine provides a crucial safeguard against government barriers that deny recourse to the judicial process. There are numerous others. *See, e.g., Cornett v. Donovan*, 51 F.3d 894 (9th Cir. 1995) (access to courts by civilly committed individuals); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976) (action in which government official threatened to withhold certain payments that were due and owing if citizen brought suit to enforce contractual obligation); *Csoka v. County of Suffolk*, 85 F. Supp. 2d 117 (E.D.N.Y. 2000) (divorce proceeding); *Bremiller v. Cleveland Psychiatric Inst.*, 898 F.

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[4] *See Don's Sod Co. v. Florida Dep't of Revenue*, 661 So. 2d 896 (Fla. Dist. Ct. App. 1995).

[5] *See In re Howard Ins. Agency, Inc.*, 109 B.R. 445 (Bankr. N.D. Okla. 1989).

[6] *See Jun v. Myers*, 88 Cal. App. 4th 117 (2001).

[7] *See La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1252 (E.D. Cal. 1994).

[8] *See Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996), *aff'd*, 520 U.S. 681 (1997).

Supp. 572 (N.D. Ohio 1995) (destruction of documents in sex-discrimination suit); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 824 (S.D. Ohio 1995) (medical-abuse case); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154 (Fla. Dist. Ct. App. 1996) (access to courts violated by products liability statute of limitations); *Village of Lake Barrington v. Hogan*, 649 N.E.2d 1366 (Ill. App. Ct. 1995) (property-rights context); *Williams v. Ill. State Scholarship Comm'n*, 563 N.E.2d 465 (Ill. 1990) (invalidating on access-to-courts ground statute restricting venue for particular suits to one county in large state); *Moses v. Hoebel*, 646 P.2d 601 (Okla. 1982) (setting aside on access-to-courts ground court order that prevented plaintiff from refiling voluntarily dismissed lawsuit without paying certain significant fees).

What these cases make clear is that the right of access to courts is not limited to "institutional mechanisms" that prevent access to courts and to restrictions on access by prisoners. Other forms of government action — and particularly egregious government action such as that alleged in Respondent's narrow claim — that deny access to a judicial forum implicate the doctrine. Accordingly, the principle of ensuring access, rather than the narrow fact patterns that Petitioners propose, should guide the Court. When viewed in that light, Respondent's claim falls well within the principled framework underlying the right of access to courts.

Courts' longstanding application of the doctrine to a variety of impediments points to two conclusions. First, Respondent's claim is the functional equivalent of the many cases in which this Court and other courts have applied the access-to-courts doctrine. Like the cases cited above and those cited in Respondent's brief, this case concerns alleged conduct — lies — by public officials that were designed to prevent Respondent from discovering the truth and suing and that did in fact prevent her from discovering the truth and suing until it was too late. The informal and perhaps aberrational nature of Petitioners' conduct and the fact that the claim arises from a fairly unique fact pattern do not undermine the core nature of the claim.

Second, the Court need not draw broad conclusions about the doctrine as a whole but rather should limit its inquiry to the particular claim that Respondent is asserting. The Court should decide whether this claim is viable and need not extend its inquiry to applications not presented here. Respondent's claim is narrow in nature and should be addressed accordingly.

B. The Court Should Not Reach The *Bivens* Argument That Petitioners Advance For The First Time In Their Opening Brief And That No Court Of Appeals Ever Has Addressed.

Until they submitted their opening brief in this Court, at no point during the litigation did Petitioners raise as an issue the possibility that, even assuming the existence of the constitutional violation that Respondent alleges, the Court should not fashion a *Bivens* damages remedy. Petitioners did not raise the issue in the district court, did not raise it in the court of appeals, and did not raise it in their petition for certiorari. Only when submitting their opening brief did they inject this entirely new and significant issue — one that, to our knowledge, no court of appeals ever has addressed.

The Court should decline the invitation to consider Petitioners' novel argument that no *Bivens* remedy should be fashioned for a claim of intentional and affirmative misrepresentation by public officials resulting in significant harm. First, Petitioners did not properly present the issue or raise and preserve it below. The Court rejected a similar effort just last week. *See Owasso Indep. Sch. Dist. v. Falvo*, No. 00-1073, __ U.S. __, 2002 WL 232853, at *3 (Feb. 19, 2002) ("The parties, furthermore, did not contest the § 1983 issue before the Court of Appeals. That court raised the issue sua sponte, and petitioners did not seek certiorari on the question. We need not resolve the question here as it is our practice to decide cases on the grounds raised and considered in the Court

of Appeals and included in the question on which we granted certiorari.") (citation and quotations omitted).[9]

Indeed, in *Bivens* itself and that case's progeny, the Court declined to consider arguments that the lower courts did not address. *See Davis v. Passman*, 442 U.S. 228, 236 n.11 (1979) ("The en banc Court of Appeals did not decide whether the conduct of respondent was shielded by the Speech or Debate Clause. In the absence of such a decision, we also intimate no view on this question."); *Bivens*, 403 U.S. at 398 ("In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. . . . This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here.").

The second reason that the Court should decline to consider Petitioners' belated *Bivens* argument is because of the argument's extraordinary nature (as discussed below) — that a

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[9] *See also Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) ("Although respondent presents two alternative grounds for the affirmance of the decision below, we decline to address these claims at this stage in the litigation. The Court granted certiorari on only the EMTALA issue, and these claims do not appear to have been sufficiently developed below for us to assess them in any event.") (footnote omitted); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("These matters fall outside the scope of the question presented in the Government's petition for certiorari. . . . We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued.").

constitutional damages claim based on affirmative misrepresentations to citizens by public officials should be displaced by a statutory scheme that provides no remedy whatsoever for those misrepresentations. Before wading into that fray, the Court should allow this significant issue to be addressed by the lower courts in the first instance. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J.) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task . . . ."); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (on denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

Petitioners belatedly are seeking to insert a significant and complicated issue into this litigation. Because neither the lower courts in this case nor any court of appeals has addressed the issue in the first instance, the Court should forego decision.

C. If The Court Does Reach Petitioners' *Bivens* Argument, The Court Should Reject The Argument.

In assessing Petitioners' argument that the Court should not imply a *Bivens* remedy for the constitutional violation forming the basis for Respondent's claim, it is important to focus on the underlying policy of the *Bivens* rule: that legal remedies should exist to deter individual federal officials from committing constitutional violations and that a damages remedy that acts as a deterrent is appropriate unless an adequate alternative remedy exists or unless implication of a damages remedy would undermine some overriding federal policy. *See Corr. Servs. Corp. v. Malesko*, __ U.S. __, 122 S. Ct. 515, 521 (2001) ("The

purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); *id.* at 523 (noting that federal inmates in privately operated institutions had "full access to remedial mechanisms established by the [Bureau of Prisons]").

Providing Respondent with a damages remedy for Petitioners' misconduct would fulfill the policy objectives of the *Bivens* doctrine, and the Court should reject Petitioners' argument.

1. Implying A *Bivens* Remedy Would Effectively Deter Egregious Affirmative Misrepresentations By Public Officials Designed To Prevent Citizens From Learning The Truth And Filing Suit.

A damages remedy for Respondent's claim would act as a deterrent to misconduct by public officials such as that alleged in this case. Respondent is suing the specific officials who allegedly lied to her and is seeking to hold them liable in their personal capacities. The Court repeatedly has noted that the purpose of the *Bivens* remedy is to deter individual officers from violating the Constitution. *See Meyer*, 510 U.S. at 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); *Carlson v. Green*, 446 U.S. 14, 21-22 (1980).

This case is a prototype of an effective *Bivens* deterrent. Respondent alleges that Petitioners communicated directly with her and lied to her in order to prevent her from discovering the truth and from commencing a lawsuit against the responsible government officials. A damages remedy against Petitioners in their personal capacities provides the most effective deterrent against further behavior of that sort.

Conversely, failure to imply a *Bivens* remedy here would result in no deterrent at all to this type of misbehavior. Petitioners and the United States describe FOIA and similar statutes in great detail, including the punishment that federal employees can receive for violating the statute. However, at no

point do Petitioners or the United States explain how those mechanisms would deter affirmative lies by public officials occurring outside of the FOIA process that are designed to impede access to the courts. While an official may be disciplined for not complying with FOIA, oral misrepresentations by government officials are not covered by FOIA or the other statutes that Petitioners and the United States have cited. Thus, failure to imply a *Bivens* remedy would eliminate any real deterrent to this type of misconduct with respect to individual officers.

Accordingly, the Court should imply a *Bivens* remedy absent an adequate alternative remedy or other special factors counseling hesitation. As described below, neither Petitioners nor the United States has provided a justification for not implying a damages remedy.

2. FOIA And Similar Statutes Are Not Remedial In Nature And Do Not Provide Respondent With An Alternative Remedy In This Case.

Without a damages remedy, Respondent would be left with no remedy for Petitioners' constitutional violations. FOIA and similar statutes say nothing about the harm suffered as a result of oral affirmative lies by public officials. Petitioners and the United States do not explain how, in light of what is alleged here (i.e., affirmative and deliberate misrepresentations designed to induce Respondent not to sue), Respondent could "remedy" her harm by resorting to FOIA.

The whole basis for Respondent's claim, after all, is that, regardless of other information that might have existed, Respondent relied on Petitioners' alleged direct oral misrepresentations in refraining from filing a FOIA request and filing suit. FOIA does not speak to that harm and, indeed, *could not* speak to that harm in light of Respondent's allegation that Petitioners' alleged misrepresentations induced her not to file a FOIA request in the first place. It is hard to imagine how

FOIA could remedy harm suffered because of conduct that induces a plaintiff not to seek FOIA's benefits.

In each instance in which this Court has held that a *Bivens* action is precluded by an adequate alternative remedial scheme, that alternative remedy has provided the plaintiff with some sort of relief for the injury suffered. The alternative remedial scheme need not provide the plaintiff's entire measure of damages, but it must provide some sort of relief in lieu of a full damages remedy. For example, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Social Security recipients whose benefits had been improperly terminated had received substantial relief from the administrative appeal process, including restoration to disabled status and an award of full retroactive benefits. *See id.* at 417. Thus, although imperfect (for example, the statutory scheme did not provide for consequential damages or damages for emotional distress), the Court held that Congress had created an adequate alternative remedy. *See id.* at 425 ("Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.").

Similarly, in *Bush v. Lucas*, 462 U.S. 367 (1983), the improperly terminated federal employee had received, through the administrative process, restoration to his former position and back pay. *See id.* at 371. The scheme was intended to "put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id.* at 388 (quotations and footnote omitted). That remedial scheme, although it did not provide every possible remedy, was adequate and thus precluded a *Bivens* damages remedy. *See id.* at 388-89; *see also Chappell v. Wallace*, 462 U.S. 296 (1983) (declining to imply *Bivens* remedy because, in part, soldiers had several remedies for misconduct by superiors, including award of retroactive back pay and retroactive promotion).

Thus, when the Court has held that an alternate remedial scheme precludes a *Bivens* damages remedy, the alternate remedy is one that, after the harm occurs, ameliorates to a significant degree the harm suffered. The alternate remedy

need not be perfect or complete, but it must do something to put the plaintiff in the position (or close to the position) in which he or she would have been absent the wrongdoing.

FOIA and similar statutes do not come close to fitting that bill, given that FOIA is not and never has been a remedial statute. The Sixth Circuit has recognized as much in affirming the withholding of FOIA materials that the plaintiff argued would support his claim that his constitutional rights were violated:

> To the extent that the agency violates the constitutional rights of citizens, there are remedies such as *Bivens* actions, or § 1983 in the case of state and local law enforcement agencies. FOIA was intended as a sunshine measure to bring agency operations to public knowledge within specified limits, not as the primary vehicle for prosecuting agency misbehavior.

Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994). Thus, Petitioners' description of the "intricate" FOIA "rights, remedies, and procedures," *see* Pet. Brief at 35-36, is irrelevant. Even if an individual may sue to enforce FOIA and may recover attorneys fees and costs and even if federal employees may be disciplined for violating that statute, that scheme does nothing to deter federal employees from lying to citizens outside of the FOIA process and does nothing to compensate the victims of those misrepresentations.

Respondent's factual allegations prove the point regarding FOIA's inadequacy as a "remedy" in this context. Respondent's claim is that, because of Petitioners' repeated lies to her, she did not file an immediate FOIA request. Rather, she relied on those lies to her detriment by not conducting further investigation, including resort to FOIA. Petitioners, of course, are entitled to dispute as a factual matter the reasonableness of Respondent's reliance. But assuming the truth of Respondent's allegations, as we must at this stage of the litigation,

Petitioners' lies induced her not to take further action until it was too late.

Congress, in enacting FOIA and similar statutes, hardly intended to provide a remedy for plaintiffs victimized by affirmative misrepresentations by government on which they rely to their detriment. Nor does the existence of FOIA and similar statutes do anything to deter public officials from lying to citizens and thereby harming them. Petitioners and the United States have identified no meaningful alternative remedial scheme to defeat implication of a *Bivens* remedy for the constitutional violation that Respondent alleges.

3. A *Bivens* Remedy In This Case — A Case Of Affirmative Misrepresentation — Would Not Jeopardize American Foreign Policy.

Implying a remedy here would not have a detrimental impact on foreign policy. Again, this is not a duty-to-disclose claim, as Petitioners and the United States repeatedly and inaccurately assert. *See, e.g.*, Pet. Brief at 38 ("In this case, the allegations in respondent's *Bivens* action raise issues about whether the highest-ranking State Department and NSC officials may legitimately withhold information from her — even if necessary through deception . . . ."); Brief of Amicus Curiae United States at 37 ("Supplementation of that elaborate and interlocking system of disclosure obligations would be doubly inappropriate here, because respondent predicates her claim for constitutional relief on an alleged intentional withholding of information pertaining to foreign affairs and intelligence operations.").

Rather, the case involves an allegation of affirmative lies by public officials designed to prevent a citizen from filing suit. Deterring public officials from engaging in that type of conduct would not negatively impact United States foreign policy. If public officials do not wish to disclose sensitive foreign-relations information, they need not do so. Moreover, if they wish to assert a defense to a FOIA request or FOIA lawsuit on

the ground that disclosure would jeopardize foreign policy, they can raise that defense.

That prerogative, however, should not become a license to lie to citizens in order to prevent them from discovering the truth and filing suit. We do not disagree with the assertions of Petitioners and the United States about the importance of allowing the government to conduct an effective, and at times secretive, foreign policy. Imposing liability for the affirmative misrepresentations in this case, however, will not undermine the government's ability to do so.

This case is much closer to *Davis v. Passman*, where the Court implied a *Bivens* remedy for conduct occurring within Congress itself, than to *Schweiker* and *United States v. Stanley*, 483 U.S. 669 (1987), where the Court held that the need for military cohesion and the harm that could result from interference by the judiciary in military operations precluded such a remedy. As the Court made clear in *Davis*, it does not reflexively defer to coordinate branches in deciding whether to imply a remedy. Instead, a presumption exists that all public officials are under a duty to obey the law, *see Davis*, 442 U.S. at 245 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)), and that violations of the law by public officials trigger the jurisdiction of the courts to remedy those violations, *see id.* Only where implication of a remedy would cause significant harm to some articulable federal policy or function is it appropriate to deny a damages remedy. Here, given the nature of Respondent's claim, Petitioners' foreign-policy argument provides no basis to deny Respondent a remedy.

4. The Purported Impact Of This Type Of *Bivens* Claim On The Public Fisc Provides No Basis For Barring Respondent's Claim.

Petitioners' argument regarding the public fisc is equally unpersuasive. As an initial matter, Respondent's *Bivens* claim is against Petitioners in their personal capacities and not against the United States. Although the United States may choose to

indemnify *Bivens* defendants, it is not obligated to do so. The relevant Department of Justice regulation provides

> that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award . . . .

28 C.F.R. § 50.15(a)(8)(iii). Thus, any impact on the Treasury would be because the United States chooses to indemnify Petitioners and not because the United States is required to pay a damages judgment.[10]

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[10] Thus, *FDIC v. Meyer*, far from supporting Petitioners' public-fisc argument, actually undermines it. In *Meyer*, the Court refused to imply a *Bivens* remedy against a *federal agency*, as opposed to against an individual federal officer, in part because "if we were to recognize a direct action for damages against *federal agencies*, we would be creating a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486 (emphasis added). Respondent, of course, is not asserting her *Bivens* claim against the United States or any agency of the United States.

At no point did *Meyer* so much as suggest that its "financial burden" rationale barred *Bivens* claims against federal officials being sued in their personal capacities. Quite to the contrary, the Court noted that a significant problem with allowing a *Bivens* claim against federal agencies was that such a claim would effectively supplant *Bivens* claims against individual officers and thus undermine the deterrent effect of such claims. *See id.* at 485 ("If we were to imply a damages

(Footnote continued)

Moreover, even assuming the fundamental predicate of Petitioners' public-fisc argument — that Respondent's *Bivens* claim actually impacts the public fisc — Petitioners have not identified any meaningful financial distinction between implying a damages remedy here and implying one in *Bivens* and its progeny. The factual scenario in *Bivens* itself — a Fourth Amendment violation by law enforcement — is a much more common fact pattern than the factual context here and thus is much more likely to generate a significant number of damages awards. Apart from general assertions, Petitioners do not explain why Respondent's particular claim is likely to harm the government's finances.

Petitioners also assert that because the Federal Tort Claims Act ("FTCA") does not permit a damages remedy against the United States for misrepresentations, the Court should not expose the Treasury to *Bivens* liability for the same misrepresentations. Petitioners' reliance on FTCA is misplaced, given that the Court has held in no uncertain terms that FTCA does not preempt *Bivens* claims. *See Carlson*, 446 U.S. at 17-23. Thus, for example, FTCA bars punitive damages against the United States and does not permit jury trials. *See* 28 U.S.C. §§ 2402, 2674. Yet, despite those strict rules — which likely were motivated by a desire to protect the public fisc — this Court has permitted punitive damages and jury trials for *Bivens* claims. *See Carlson*, 446 U.S. at 21-22.

Permitting a somewhat larger scope of liability for *Bivens* actions makes sense because it is more difficult for plaintiffs to

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action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under *Meyer*'s regime, the deterrent effects of the *Bivens* remedy would be lost."). *Meyer*'s public-fisc rationale has no bearing at all on Respondent's claim against these Petitioners in their personal capacities.

recover under *Bivens* than under FTCA. To obtain damages based on a *Bivens* claim, a plaintiff must overcome qualified immunity and often must show intent. *See Meyer*, 510 U.S. at 485 (noting that qualified immunity could be defense to *Bivens* action); *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that due-process violation required deliberate indifference). FTCA, by contrast, permits liability based on negligent conduct and does not cloak the government with qualified immunity. *See* 28 U.S.C. §§ 2674, 2680; *Meyer*, 510 U.S. at 485. Thus, a limitation on FTCA liability — the rationale for which may be to limit the scope of government liability based on FTCA's lower threshold — does not apply with the same force in the context of harder-to-obtain *Bivens* liability. And, again, it bears repeating that *Bivens* liability is imposed on individual officers, not the government, meaning that FTCA's policy considerations are less relevant in the *Bivens* context.

In addition (and perhaps most fundamentally), Petitioners' FTCA argument turns the rationale for *Bivens* on its head by asking the Court to refuse to imply a *Bivens* remedy because Congress, in a different statutory scheme pertaining to the liability of the United States itself (as opposed to the personal liability of individual public employees), may have chosen to bar similar claims arising from misrepresentations. Yet, if as Petitioners argue, Respondent lacks a non-*Bivens* claim for Petitioners' misrepresentations (i.e., she lacks an adequate alternative remedy), then under the *Bivens* rationale, Respondent should, if anything, be permitted to assert a constitutional damages remedy. *See Bivens*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring in judgment).

Petitioners' public-fisc argument is a red herring, and the Court should reject it.

IV. CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT RUBIN
LAWYERS' COMMITTEE
FOR CIVIL
RIGHTS OF THE SAN
FRANCISCO BAY AREA
301 Mission Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2500

ROBERT E. BORTON
SCOTT D. WIENER
Counsel of Record
HELLER EHRMAN WHITE
& McAULIFFE LLP
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000

Attorneys for Amici Curiae
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS OF
THE SAN FRANCISCO
BAY AREA and
AMERICAN CIVIL
LIBERTIES UNION